90-1447

Supreme Court, U.S.
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No. 91-A-601

IN THE

Supreme Court of the United States

_____ TERM, 1991

FLOYD W. BYBEE, AFTON JANE IZEN, JOE ALFRED IZEN, JR., AND LAWRENCE E. SCHOEFFLER,
Petitioners

v.

THE SUPREME COURT OF THE STATE OF ARIZONA AND BANK ONE, MILWAUKEE, N.A.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED

QUESTION 1

Are the Arizona Forcible Detainer Statutes (Arizona Revised Statutes ARS 12-1177, ARS 33-810(B) and (C), ARS 33-801) unconstitutional as applied, since citizen homeowners are deprived of possession of their property without a pre-deprivation hearing at which all defenses to the validity of the creditor's acceleration and foreclosure can be presented?

QUESTION 2

Did the Petition for Special Review to the Arizona Court of Appeals Division One, and the subsequent appeal to the Supreme Court of Arizona, adequately preserve the constitutional issues on appeal for this Court's review?

QUESTION 3

Is Rule 25, Arizona Revised Civil Appellate Procedure, 17B ARS, the rule under which the Arizona Supreme Court imposed sanctions against Floyd Bybee, Afton J. Izen and Joe A. Izen, Jr., counsel for Lawrence Schoeffler, unconstitutional in its application, since Petitioners, some of whom are attorneys, were not allowed a pre-sanction hearing before imposition of penalties and when the grounds for such sanctions are not supported on the face of the record?

QUESTION 4

Is Rule 25, Arizona Revised Civil Appellate Procedure, 17B ARS, unconstitutional in its application as constituting an unconstitutional "chill" on the availability of effective assistance of counsel and zealous advocacy (1st., 5th., 6th. and 14th. Amendments to the United States Constitution)?

PARTIES BELOW

The following persons were parties to the proceeding in the Supreme Court for the State of Arizona, the court whose judgment is sought to be reviewed:

Joe Alfred Izen, Jr.

Afton Jane Izen

Floyd W. Bybee, Esq.

Lawrence E. Schoeffler

Deborah M. Fine

Hon. Robert D. Myers, Judge
Maricopa County
Superior Court

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No. 91-A-601

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v.

THE SUPREME COURT OF THE STATE OF
ARIZONA AND BANK ONE, MILWAUKEE, N.A.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable Chief Justice of the United States, and to the Associate Justices of the United States Supreme Court:

Petitioners, Floyd Bybee, Afton Jane Izen, Joe A. Izen, Jr. and Lawrence E. Schoeffler, file this Petition for Writ of Certiorari to review the Judgment of the Supreme Court of Arizona denying the Petition for Review of Petitioner, Lawrence E. Schoeffler, and further, to review the order of the Supreme Court of Arizona which ordered that each attorney for Petitioner pay the Clerk of the

Supreme Court (of Arizona) the sum of $500.00 within twenty days of the date of the order certifying that the funds he paid have not and will not be recouped from the Petitioner.

In support of the Petition, it is respectfully shown to the Court as follows:

OPINION BELOW

A copy of the order of the Superior Court of Arizona, Maricopa County granting Plaintiff's Motion for Summary Judgment in the Forcible Detainer proceedings is attached as Appendix A. A copy of the order of the Court of Appeals, State of Arizona, Division One, ordering that the petition in a Special Action would be considered either at argument or conference during the afternoon of April 24, 1990, by Department D, Judge Brooks, with Judges Fidel and Taylor participating is attached as Appendix B. The parties were directed to reserve the afternoon in the event the Court determined that oral argument should be scheduled. A copy of the order of the Court of Appeals, State of Arizona, Division One, ordering that the Court of Appeals, in the exercise of its discretion, declines to accept jurisdiction in this Special Action and further denying Respondents' request for attorney's fees is attached as Appendix C. A copy of the order of the Supreme Court, State of Arizona denying the Petition for Review and stating that an order concerning fees and sanctions will follow is attached as Appendix D. A copy of the order of the Supreme Court of the State of Arizona finding that the petition for review was frivolous or taken solely for the purpose of delay and ordering that each attorney for petitioner pay the Clerk of the Supreme Court (of Arizona) $500.00

within twenty days of the date of this order and certify that the funds he paid have not and will not be recouped from petitioner, Schoeffler, is attached as Appendix E. A copy of the Motion for Reconsideration of Order for Sanctions requesting reconsideration of the order for sanctions of October 9, 1990, and setting out the reasons why sanctions should not have been granted is attached as Appendix F. A copy of the order of the Supreme Court of State of Arizona, denying the Motion for Reconsideration of Order for Sanctions is attached as Appendix G.

JURISDICTION

This is a civil appeal from the highest court of a State. Lawrence E. Schoeffler's Petition for Review was denied by the Supreme Court of the State of Arizona on September 24, 1990, and further orders concerning fees and sanctions were to follow. Sanctions of $500.00 for each attorney on the case were ordered on October 9, 1990. A Motion for Reconsideration of the Order for Sanctions was denied on November 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) (1988).

STATUTES INVOLVED

The granting of the Forcible Detainer against Petitioner, Lawrence E. Schoeffler, was predicated on Arizona Revised Statutes A.R.S. 12-1177, A.R.S. 33-810(B) and (C) and A.R.S. 33-801. The Order of the Supreme Court of Arizona sanctioning attorneys, Floyd Bybee, Afton Jane Izen and Joe A. Izen, Jr. and ordering that they pay $500.00 each to the Clerk of the Supreme Court of Arizona is predicated upon Rule 25, Arizona Revised

Civil Appellate Procedure, 17B A.R.S. Further, for consideration in this Writ of Certiorari, are the rights of Petitioners guaranteed by the First (1st.), Fifth (5th.), Sixth (6th.) and Fourteenth (14th.) Amendments to the United States Constitution.

SUMMARY OF THE CASE

In the course of the proceedings, Petitioner, Lawrence E. Schoeffler, admitted that he and the Respondent, Bank One, had a longstanding dispute concerning whether or not he was in default on two promissory notes. It was undisputed that he had executed two notes in favor of Marine Bank, N.A., not Bank One, in the sums of $250,000.00 and $365,000.00 secured by his homestead/residence.

It was disputed that Respondent, Bank One, followed proper foreclosure procedure for enforcement of its claims under A.R.S. Section 33-810(B) or that a proper Trustee's sale took place on December 19, 1989. Petitioners herein argued that proper notice procedures and time period requirements under A.R.S. Section 33-810(B) were violated, since a trustee can only postpone or continue a sale by giving notice of the new date, time and place by public declaration at the time and place last appointed for the sale and that the new sale date shall be a fixed date within sixty (60) days of the date of the declaration. Petitioners herein argued that Respondent, Bank One, violated the requirements of A.R.S. Section 33-810 (B) by holding a Trustee Sale more than sixty (60) days after the declaration, and that such violation of the requirements of A.R.S. Section 33-810(B) raised a genuine issue of material fact which precluded the grant-

ing of Respondent, Bank One's, Motion for Summary Judgment on the Forcible Detainer action, and its alternative Motion for Judgment on the Pleadings. Respondent, Bank One, supplied no Summary Judgment evidence rebutting this issue. Petitioner, Lawrence E. Schoeffler, therefore disputed that the property was legally sold through a Trustee's Sale under a Deed of Trust.

Petitioner, Lawrence E. Schoeffler, further argued that in order for a Trustee's Deed to give rise to a conclusive presumption that the property had been sold through a Trustee's Sale, a showing must first be made to the Court that all mandatory procedural notice requirements under A.R.S. Section 33-801 et seq., and specifically A.R.S. Section 33-810(B) and (C) had been met, especially when the property is purported to have been sold to oneself and not to a third party, as in this case. Respondent, Bank One, was not exempt from the requirements of Arizona Law.

Petitioner, Lawrence E. Schoeffler, also disputed that he received written demand for possession prior to the Forcible Detainer proceedings. He also disputed that a proper Trustee's Sale took place due to the violation of A.R.S. Section 33-810(B) by not giving proper notice of the sale, A.R.S. Section 33-810(B) by violating the sixty (60) day time requirement, and A.R.S. Section 33-811(A) which is for the protection of third party, innocent purchasers for value without notice of disputes.

Petitioner, Lawrence E. Schoeffler, also raised affirmative defenses based on lender liability, as well as, wrongful foreclosure. The Arizona Courts, therefore, had the duty to consider whether or not there were genuine material issues of material fact concerning whether or not Re-

spondent, Bank One, had violated Arizona Law in its procedure for obtaining a self-serving "Trustee's Deed" without abiding by mandatory notice requirements and A.R.S. Section 33-810(B) and 33-810(C). He further disputed Bank One's entitlement to possession of the property.

On March 22, 1990, Hon. Robert D. Myers, Judge of the Superior Court of Arizona, Maricopa County, granted Plaintiff's Motion for Summary Judgment, without entertaining any evidence on Schoeffler's affirmative defenses.

On April 25, 1990, the Court of Appeals, State of Arizona, Division One, declined to accept jurisdiction in this Special Action, and further denied respondents request for attorney's fees.

On May 25, 1990, the Petition for Review in the case styled LAWRENCE E. SCHOEFFLER, an unmarried man, Petitioner, vs. SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa; HON. ROBERT D. MYERS, a Judge thereof; and BANK ONE, MILWAUKEE, N.A., a Wisconsin Corporation, real party in interest, Respondents, Case No. SA 90-068, was denied. Petitioner Schoeffler appealed to the Supreme Court of Arizona, and the Court denied the Petition for Review and announced that an order concerning fees and sanctions would follow.

On the 9th day of October, 1990, Hon. Frank X. Gordon, Jr., Chief Justice of the Supreme Court of the State of Arizona made a finding that the petition for review was frivolous *or* taken solely for the purpose of *delay,* and ordered, under Rule 25, Ariz. R. Civ. App. P., 17B A.R.S., sanctions imposed as follows:

> "IT IS ORDERED that each attorney for petitioner is to pay the Clerk of the Supreme Court the sum of $500.00 within twenty days of the date of this order. Each attorney shall certify that the funds he paid have not and will not be recouped from petitioner."

On October 18, 1990, Counsel for Petitioner respectfully requested that the Supreme Court of Arizona reconsider its order of October 9, 1990, pursuant to Rule 22, Arizona Rules of Civil Appellate Procedure on the basis that the Supreme Court of Arizona erred in finding that the petition for review was frivolous or taken solely for the purpose of delay.

Counsel for Petitioner alleged that the sanctions were assessed in the absence of due process and the right to confrontation. Counsel for Petitioner requested an opportunity to present evidence in defense on the issues of "frivolity" and "solely for delay" and to summon witnesses. The Petition for Review was previously considered by the Court of Appeals, State of Arizona, Division One, and although attorneys fees and costs were requested by Respondents, they were denied, even though the Court declined to accept jurisdiction of the Special Action.

Petitioner's counsel also argued that the Court of Appeals had entertained oral argument on all the issues and that Counsel had received no warning from the Court of Appeals at that time that indicated any of the issues were frivolous.

Counsel for Petitioner also argued that they had made a good faith effort to challenge the constitutionality of the

Arizona Forcible Detainer Statute, specifically, that the statute as applied by the Arizona Superior Court, permits divestiture of an Arizona citizen's right to title as against the lender's claims and foreclosure without due process of law. (A pre-deprivation hearing where all defenses and affirmative claims bearing on possession can be considered).

On November 14, 1990, the Supreme Court of Arizona ordered that the Motion for Reconsideration of Order for Sanctions was denied.

STATEMENT OF THE CASE

QUESTION 1

ARE THE ARIZONA FORCIBLE DETAINER STATUTES (A.R.S. 12-1177, A.R.S. 33-810(B) and (C), A.R.S. 33-801) UNCONSTITUTIONAL AS APPLIED, SINCE CITIZEN HOMEOWNERS ARE DEPRIVED OF POSSESSION OF THEIR PROPERTY WITHOUT A PRE-DEPRIVATION HEARING AT WHICH ALL DEFENSES TO THE VALIDITY OF THE CREDITOR'S ACCELERATION AND FORECLOSURE CAN BE PRESENTED? (DUE PROCESS REQUIREMENTS AND TAKING OF PROPRTY WITHOUT DUE PROCESS OF LAW)

Although reviewing Courts are reluctant to disturb the findings of a Supreme Court of any State, there are limits to what the dictates of due process will allow. This is so, not only in the State context, but also under the Fifth Amendment to the United States Constitution and the due process clause. It is true in the Federal Courts, as well as the States.

While State Courts work to strike a balance between the interests of citizen/homeowners and lenders, it has become an increasingly important task for the courts to protect citizens' due process guarantees mandated by the United States Constitution, especially during the recent period of "hard times" which has caused a flood of accelerations and foreclosures all over the nation. Hardship to citizens could be averted, if the Arizona Courts were more receptive to these problems that have arisen. Here the lender was allowed to say that it followed the State foreclosure rules, write itself a Trustee's Deed and file a Forcible Detainer action. The Arizona Court summarily granted the detainer without any consideration of the real facts.

In the case of Petitioner herein, Lawrence E. Schoeffler, the Arizona Courts refused to consider the facts of the case and granted Summary Judgment in Respondent, Bank One's, Forcible Detainer action, even though it was obvious that there were fact issues concerning the procedural aspects of the acceleration and foreclosure, the legality of the Trustee's Deed, as well as affirmative defenses of consumer debt violations, default, and presentment and notice irregularities.

This case involves a challenge to the constitutionality of Arizona Revised Statutes A.R.S. Section 12-1177, A.R.S. Section 33-810(B) and (C) and A.R.S. Section 33-801, and pertains to Forcible Detainer to the extent such statutes are applied by the Arizona Courts so as to deny a citizen (homestead owner) the right to present and/or try his claims of title (defective foreclosure) in the Forcible Detainer proceeding before he is divested of possession. The Arizona Courts' interpretation of these

statutes and their implementation of these statutes, as well as the fashion in which they are enforced against the public, is a denial of due process and denial of equal protection of the law guaranteed to the Arizona public under the Fourteenth (14th) Amendment to the United States Constitution.

In *Fuentes v. Shevin*, 92 S. Ct. 1983 (1972), it was held that:

> "Central meaning of "procedural due process" is that parties whose rights are to be affected are entitled to be heard . . .
>
> The constitutional right to be heard is a basic aspect of duty of the Court to follow a fair process of decision making when it acts in depriving a person of his property; the purpose of the requirement is not only to ensure abstract fair play to the individual, but to protect his use and possession of property from arbitrary encroachment in order to minimize substantively unfair or mistaken deprivations of property . . ."

The *Fuentes* case goes on to say that:

> "Right to notice and hearing . . . . must be granted at the time when deprivation can still be prevented inasmuch as, even though at later hearing his possession can be returned to him or damages may be awarded for wrongful deprivation, no later hearing and no damage award can undo the fact that arbitrary taking that was subject to right of procedural due process has already occurred. . . .
>
> Whatever its form, opportunity for hearing must be provided before deprivation of property interest takes effect. . . .

> Right of party in possession of property to be heard before he is deprived of it does not depend upon an advance showing that he will surely prevail at the hearing and it is enough to invoke procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractural right to continued possession and use of the [property]. . ."

Further, *Fuentes* says that:

> "Even if buyers had fallen behind in their installment contracts and had no other valid defenses to repossession of the property, they were still entitled, under the due process clause, to a hearing before the property was repossessed. . . .
>
> The rather ordinary costs in time, effort and expense resulting from hearing held prior to deprivation of property interest cannot outweigh the constitutional right to such a hearing. . . .
>
> Procedural due process is not intended to promote efficiency or to accommodate all possible interests. It is intended to protect the particular interests of the person whose possessions are about to be taken."

As in the *Fuentes* case, it was an unconstitutional infringement upon Petitioner's rights under the Fourteenth Amendment to the United States Constitution when the Arizona State Courts deprived him of his property through a summary proceeding in which his defenses and counterclaims were not allowed to be heard and were not considered before he was deprived of his homestead.

QUESTION 2

DID THE PETITION FOR SPECIAL REVIEW TO THE ARIZONA COURT OF APPEALS, DIVISION ONE, AND THE SUBSEQUENT APPEAL TO THE SUPREME COURT OF ARIZONA, ADEQUATELY PRESERVE THE CONSTITUTIONAL ISSUES ON APPEAL FOR THIS COURT'S REVIEW?

The Constitutional issues on appeal for this Court's review were adequately preserved for this Court's review. They were argued originally in the Forcible Detainer action in the Superior Court of Arizona, Maricopa County, and then in both the appeal by way of Special Review filed in the Court of Appeals, State of Arizona, Division One and the Supreme Court of the State of Arizona. The issue preserved at the Superior Court level was Petitioner's entitlement to a pre-deprivation hearing determining whether or not the acceleration and foreclosure were valid and whether he had valid defenses before he was deprived of possession of his homestead. The Order of the Superior Court of Arizona, Maricopa County granting Summary Judgment is attached as Appendix A. The Order of the Court of Appeals, State of Arizona, Division One, declining to accept jurisdiction in the Special Action is attached as Appendix C. The Order of the Supreme Court of Arizona denying the Petition for Review is attached as Appendix D.

The sanctions against Petitioner's counsel arose only in the Supreme Court of Arizona. The direct appeal to this Court preserves that issue. The Orders of the Supreme Court of Arizona granting sanctions against Petitioner's counsel are attached as Appendix D, Appendix E and Appendix G.

QUESTION 3

IS RULE 25, ARIZONA REVISED CIVIL APPELLATE PROCEDURE, 17B A.R.S., THE RULE UNDER WHICH THE ARIZONA SUPREME COURT IMPOSED SANCTIONS AGAINST FLOYD BYBEE, AFTON JANE IZEN AND JOE A. IZEN, JR., COUNSEL FOR LAWRENCE E. SCHOEFFLER, UNCONSTITUTIONAL IN ITS APPLICATION, SINCE PETITIONERS, SOME OF WHOM ARE ATTORNEYS, WERE NOT ALLOWED A PRE-SANCTION HEARING BEFORE IMPOSITION OF PENALTIES AND WHEN THE GROUNDS FOR SUCH SANCTIONS ARE NOT SUPPORTED ON THE FACE OF THE RECORD?

In *Roadway Express, Inc. v. Piper*, 447 U.S. 767, 100 S. Ct. 2464 (1980), the United States Supreme Court made it clear that:

> ". . . sanctions should not be assessed lightly or without fair notice and an opportunity for a hearing on the record."

No such opportunity for a hearing was provided in the instant case, even though a Motion for Reconsideration of Sanctions was filed with the Court requesting such a hearing.

Imposition of monetary sanctions by a Court on an attorney without affording an attorney prior notice and opportunity to be heard violates the due process guarantees of the Fifth and Fourteenth Amendments to the United States Constitution. *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557 (Circuit Three 1985).

The Court imposing sanctions is required to express a basis for imposition of sanctions, to identify the objectionable conduct sufficiently to allow the sanctioned person a meaningful opportunity to respond. Further, evaluation of an attorney's behavior based on briefs filed on the merits of an appeal, arguments, and appellate record is necessary, but by itself is insufficient to impose sanctions upon an attorney for frivolous appeals.

In order to deserve sanctions, an attorney must have engaged in a serious and studied disregard for the orderly process of justice. Where counsel's alleged misconduct, which is made the basis of this claim for holding counsel liable for excessive costs, was the filing and arguing of a claim, it is not sufficient that the claim be found to be meritless, but the claim must be found to be without a plausible legal or factual basis and lacking in justification. The attorney must intentionally file or prosecute a claim that lacks a plausible legal or factual basis. *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223 (Circuit Seven 1984).

Even if there is a lack of merit of an action, the claim must lack even colorable basis in law to justify an award of fees against an attorney for excessive costs. *Marco Holding Co. v. Lear Siegler, Inc.*, 606 F.Supp. 204 (D.C. N.D. Ill. 1985).

On January 1, 1991, the case of *Fellows v. Martin*, 217 Conn. 57, was decided by the *Supreme Court of Connecticut*. It dealt with the taking of property by a summary process action. The *Supreme Court of Connecticut* found that there was no longer sufficient justification for the old prohibition against the application of equitable principles barring forfeitures to summary process, and held that if an equitable claim is properly raised, it may be considered by the trial court. The *Fellows* case is much

like the case at issue, because both cases were to be decided by a summary process in which the Respondent was denied the ability to prove defenses and affirmative claims, which would have barred or defeated the creditor's claims for possession.

The *Fellows* case is also evidence that, Lawrence E. Schoeffler's, Co-Petitioners, who represented him in the Forcible Detainer action could make a good faith argument to "advance" or to "change" the law in Arizona regarding the summary process for Forcible Detainer proceedings which presently does not allow a Respondent in such summary process to advance defenses or affirmative claims which would prevent deprivation of his property without due process of law.

To establish bad faith, which is the test in this case, a hearing was required to determine if the appeal was frivolous or was taken solely for the purposes of delay. Further, the record is unclear as to what the "$500.00 sanctions per attorney" represented. The Order of the Supreme Court of Arizona is clearly erroneous and should be reversed and a judgment should be rendered by this Court that the attorneys herein are not liable for sanctions.

QUESTION 4

IS RULE 25, ARIZONA CIVIL APPELLATE PROCEDURE, 17B A.R.S., UNCONSTITUTIONAL IN ITS APPLICATION AS CONSTITUTING AN UNCONSTITUTIONAL "CHILL" ON THE AVAILABILITY OF EFFECTIVE ASSISTANCE OF COUNSEL AND ZEALOUS ADVOCACY? (FIRST, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION)

Unbridled exercise of power to sanction attorneys would inevitably lead to a chilling of the zealous representation which clients have a right to expect from their counsel. It is obvious that an attorney is not likely to attempt to change the law, if other attorneys before him have been sanctioned by a particular court for such advocacy. It is also obvious that an attorney is not likely to represent a client in a controversial proceeding if he is likely to be sanctioned for such representation. This unbridled power of courts to sanction attorneys, merely to create an atmosphere where no attorney will represent a client in such proceedings, is unconstitutional under the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and constitutes an impermissible chill on zealous advocacy.

REASONS FOR ALLOWANCE OF THE WRIT

1. The Arizona Forcible Detainer Statutes (Arizona Revised Statutes A.R.S. Section 12-1177, A.R.S. Section 33-810(B) and (C) A.R.S. Section 33-801) are unconstitutional as applied, since citizen homeowners are deprived of possession of their property without a predeprivation hearing at which all defenses to the validity of the creditor's acceleration and foreclosure can be presented.

2. The Petition for Special Review to the Arizona Court of Appeals, Division One, and the subsequent appeal to the Supreme Court of Arizona, adequately preserved the constitutional issues on appeal for this Court's review.

3. Rule 25, Arizona Revised Civil Appellate Procedure, 17B A.R.S., the Rule under which the Arizona

Supreme Court imposed sanctions against Floyd Bybee, Afton Jane Izen and Joe A. Izen, Jr., counsel for Lawrence E. Schoeffler, is unconstitutional in its application since Petitioners, some of whom are attorneys, were not allowed a pre-sanction hearing before imposition of penalties and because the grounds for such sanctions are not supported on the face of the record.

4. Rule 25, Arizona Revised Civil Appellate Procedure, 17B A.R.S., is unconstitutional in its application as constituting an unconstitutional "chill" on the availability of effective assistance of counsel and zealous advocacy under the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For all of the reasons stated herein, this Writ of Certiorari should be granted.

Further, Petitioners pray that this Court reverse the Order of the Supreme Court of Arizona denying the Petition for Review of Lawrence E. Schoeffler and render a judgment that the Arizona Forcible Detainer Statutes A.R.S. Section 12-1177, A.R.S. Section 33-810(B) and (C) and A.R.S. Section 33-801 are unconstitutional as applied to citizen homeowners who are deprived of possession of their homes without due process of law in a summary proceeding where they are not allowed to prove affirmative defenses and counterclaims, and remand the case for further proceedings with instructions allowing Lawrence E. Schoeffler to present defenses and affirmatime claims in a meaningful trial of the matter; and

Further, Schoeffler's Co-Petitioners, Floyd Bybee, Afton Jane Izen and Joe A. Izen, Jr., pray that the order of the Supreme Court of Arizona sanctioning each attorney $500.00 dollars be reversed and remanded with instructions that judgment be entered consistent with this Court's opinion.

Respectfully submitted,

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APPENDIX A

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

HON. ROBERT D. MYERS
Judge

3/22/90
Date

T. Fenton
Deputy

NO. CV 90-01627

BANK ONE, MILWAUKEE, N.A.
Thomas G. Ryan/
Deborah M. Fine

vs.

LAWRENCE E. SCHOEFFLER, et al
Afton J. Izen
P. O. Box 56746
Houston, TX 77027

Floyd W. Bybee

3:55 p.m. This is the time set for oral argument on Defendant's Application for Limited Admission of Afton Izen, Plaintiff's Motion To Strike Response to Plaintiff's Reply and Plaintiff's Motion For Summary Judgment Or, Alternatively, Judgment On The Pleadings. Plaintiff is represented by counsel, Thomas G. Ryan and Deborah M. Fine. Defendant, Lawrence E. Schoeffler, is present with counsel, Afton J. Izen.

Court Reporter, Cindy Grasmoen, is present.

Pursuant to Defendant's Application For Limited Admission, and there being no opposition,

IT IS ORDERED granting the Application.

Insofar as Plaintiff's Motion To Strike Response to Plaintiff's Reply, for which oral argument has been requested, is concerned, and pursuant to Rule 78 of the Arizona Rules of Civil Procedure,

IT IS ORDERED denying the request for oral argument.

IT IS FURTHER ORDERED granting Plaintiff's Motion to Strike. The pleading is untimely and if counsel wish to file a pleading other than those permitted by the Rules, application should have been made before the pleading was filed.

Plaintiff's Motion For Summary Judgment is argued to the Court.

IT IS ORDERED granting Plaintiff's Motion For Summary Judgment.

Counsel for Plaintiff may submit a formal, written Judgment for restitution of the premises and for costs.

Counsel for Plaintiff may also make application for attorneys' fees and counsel for Defendant may file the appropriate response.

4:30 p.m. Court adjourns.

APPENDIX B

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LAWRENCE E. SCHOEFFLER,
an unmarried man,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF ARIZONA,
in and for the County of Maricopa,

THE HONORABLE ROBERT D. MYERS,
a judge thereof,
Respondent Judge,

BANK ONE, MILWAUKEE, N.A.,
a Wisconsin corporation,
Real Party in Interest.

1 CA-SA 90-068

MARICOPA County Superior Court
NO. CV 90-01627

ORDER SETTING DATES DIRECTING SERVICE and FIXING TIME FOR RESPONSE

A petition in a special action having been filed,

IT IS ORDERED that said petition will be considered either at argument or conference during the AFTERNOON of April 24, 1990, by Department D, Judge Brooks, with Judge Fidel and Taylor participating. The

parties and their counsel are directed to reserve the AFTERNOON of the above date in the event the court determines that oral argument should be scheduled.

IT IS FURTHER ORDERED that objections to the relief requested in the petition, whether in the form of a response, motion memorandum, or some combination of these shall be in writing and shall be filed and served on or before *April 9, 1990*. After the time for filing a response has expired, the parties will be notified if oral argument will be heard or if the matter will be considered at court conference only. The date in any event, will be as indicated in the first paragraph.

IT IS FURTHER ORDERED that the service of the petition and this order may be effected by the attorney for the petitioner or agent:

> (a) Upon the respondent judge by mailing the same to the judge's official office or by delivering the same to the respondent judge; and
>
> (b) upon all other respondents, including respondent real parties in interest, by serving the superior court attorney of record for each respondent to be served, in the same manner that a responsive pleading would be served pursuant to the Rules of Civil Procedure. Should it be that any respondent does not have an attorney of record in the superior court, then service may be accomplished by service upon the respondent in person or by ordinary mail.

Proof of service shall be promptly filed in the Court of Appeals.

DATED this 29th day of March, 1990.

By: /s/ SARAH D. GRANT,
Sarah D. Grant, Chief Judge

APPENDIX C

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LAWRENCE E. SCHOEFFLER,
an unmarried man,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF ARIZONA,
in and for the County of Maricopa,

THE HONORABLE ROBERT D. MYERS,
a judge thereof,
Respondent Judge,

BANK ONE, MILWAUKEE, N.A.,
a Wisconsin corporation,
Real Party in Interest.

1 CA-SA 90-068

DEPARTMENT D

MARICOPA County Superior Court
NO. CV 90-01627

O R D E R

This special action was considered at conference on April 24, 1990, Presiding Judge J. Thomas Brooks and Judges Noel Fidel and John F. Taylor participating.

IT IS ORDERED that the Court of Appeals, in the exercise of its discretion, declines to accept the jurisdiction in this special action.

IT IS FURTHER ORDERED denying respondents' request for attorney's fees.

DATED this 25th day of April, 1990.

By: /s/ J. THOMAS BROOKS,
J. Thomas Brooks, Presiding Judge

APPENDIX D

SUPREME COURT
STATE OF ARIZONA

Noel K. Dessaint
Clerk of Court

Kathleen E. Kempley
Chief Deputy Clerk

201 West Wing State Capitol
3700 West Washington
Phoenix, Arizona 85007-3846
Telephone: (607) 542-4536

September 24, 1990

RE: LAWRENCE E. SCHOEFFLER vs. SUP CT MARICOPA CO-HON. ROBERT D. MYERS/ BANK ONE, MILWAUKEE
Supreme Court No. CV-90-0219-PR
Court of Appeals No. 1 CA-SA 90-068
Maricopa County No. CV 90-01627

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 18, 1990, in regard to the above-referenced cause:

ORDERED: Petition for Review — DENIED. Order concerning fees and sanctions will follow.

Record returned to the Court of Appeals, Division One, Phoenix, this 24th day of September, 1990.

NOEL K. DESSAINT, Clerk

TO:

Floyd W. Bybee, Esq.. P.O. Box 83312, Phoenix, AZ 85071

Joe Alfred Izen, Esq. and Afton Jane Izen, Esq., Izen and Associates, P.C., 5222 Spruce Street, Bellaire, TX 77401

Deborah M. Fine, Esq., Lewis and Roca, 40 N. Central Ave., Suite 2, Phoenix, AZ 85004

Glen D. Clark, Clerk, Court of Appeals, Division One, West Wing, State Capitol, 1700 W. Washington, Phoenix, AZ 85007

Mead Data Central, Inc., P.O. Box 8809, Dayton, OH 45401

EXHIBIT B

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

LAWRENCE E. SCHOEFFLER, an unmarried man,
Petitioner,

vs.

SUPRERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa; HON. ROBERT D. MYERS, a Judge thereof; BANK ONE, MILWAUKEE, N.A., a Wisconsin corporation, real party in interest; and COURT OF APPEALS FOR THE STATE OF ARIZONA, Division One,
Respondents.

Supreme Court
No. CV-90-0219-PR

Court of Appeals
No. 1 CA-SA 90-068

Maricopa County
No. CV 90-01627

ORDER

The Court has previously denied the petition for review filed by petitioner. In addition, the Court further finds that the petition for review was frivolous or taken solely for the purpose of delay. Therefore, under Rule 25, Ariz. R. Civ. App. P., 17B A.R.S., sanctions are imposed as follows:

IT IS ORDERED that each attorney for petitioner is to pay the Clerk of the Supreme Court the sum of $500 within twenty days of the date of this order. Each attorney

shall certify that the funds he paid have not and will not be recouped from petitioner.

Dated this 9th day of October, 1990.

/s/ FRANK X. GORDON, JR.
Frank X. Gordon, Jr.
Chief Justice

TO:

Floyd W. Bybee, Esq., P.O. Box 83312, Phoenix, AZ 85071

Joe Alfred Izen, Esq. and Afton Jane Izen, Esq., Izen and Associates, P.C., 5222 Spruce Street, Bellaire, TX 77401

Deborah Fine, Esq., Lewis and Roca, 40 N. Central Ave., Suite 2, Phoenix, AZ 85004

Glen D. Clark, Court of Appeals, Division One, West Wing, State Capitol, 1700 W. Washington, Phoenix, AZ 85007

EXHIBT C

APPENDIX F

Afton Jane Izen, TX Bar #10443400
IZEN AND ASSOCIATES, P.C.
5222 Spruce Street
Bellaire, TX 77401
713-668-8815
Attorneys for Petitioner

Floyd W. Bybee, AZ Bar #012651
9201 N. 25th Ave. Suite #110
Phoenix, AZ 85021
602-870-9700
Local Counsel for Petitioner

THE SUPREME COURT
FOR THE STATE OF ARIZONA

LAWRENCE E. SCHOEFFLER, and unmarried man,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF ARIZONA,
in and for the County of Maricopa;

HON. ROBERT D. MYERS, a Judge thereof;

BANK ONE, MILWAUKEE, N.A., a Wisconsin
corporation, real party in interest; and

COURT OF APPEALS FOR THE STATE OF
ARIZONA, Division One,
Respondents.

Case No. CV-90-0219-PR

Court of Appeals
No. 1 CA-SA 90-068

Superior Court
No. CV90-01627

Bankruptcy Court
No. 88-8399 Adv. B

MOTION FOR RECONSIDERATION OF ORDER FOR SANCTIONS

TO THE HONORABLE SUPREME COURT FOR THE STATE OF ARIZONA:

COUNSEL FOR THE PETITIONER, Lawrence E. Schoeffler, respectfully petitions this Court pursuant to Rule 22 of the Arizona Rules of Civil Appellate Procedure for reconsideration of the order for Sanctions issued on October 9, 1990, and as grounds therefore would respectfully show the following:

1. On April 25, 1990, the Court of Appeals, State of Arizona, Division One declined to accept jurisdiction in this special action, and further denied respondents request for attorney's fees. A copy of that order is attached hereto as Exhibit A and incorporated herein by reference.

2. On May 25, 1990, the case styled, LAWRENCE E. SCHOEFFLER, an unmarried man, Petitioner, vs. SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa; HON. ROBERT D. MYERS, a Judge thereof; and BANK ONE, MILWAUKEE, N.A., a Wisconsin corporation, real party in interest, Respondents, Case No. SA 90-068, was appealed to the Supreme Court of the State of Arizona.

3. On September 24, 1990, the Supreme Court of Arizona denied the Petition for Review, and announced that an order concerning fees and sanctions would follow. A copy of that order is attached hereto as Exhibit B and incorporated herein by reference.

4. On the 9th day of October, 1990, Hon. Frank X. Gordon, Jr., Chief Justice of the Supreme Court of the State of Arizona made a finding that the petition for

review was frivolous *or* taken solely for the purpose of delay, and ordered, under Rule 25, Ariz. R. Civ. App. P., 17B A.R.S., sanctions imposed as follows:

> "IT IS ORDERED that each attorney for petitioner is to pay the Clerk of the Supreme Court the sum of $500 within twenty days of the date of this order. Each attorney shall certify that the funds he paid have not and will not be recouped from petitioner."

A copy of that order is attached hereto as Exhibit C and incorporated herein by reference.

5. Counsel for Petitioner respectfully request that this Court reconsider its order of October 9, 1990, pursuant to Rule 22, Arizona Rules of Civil Appellate Procedure on the basis that the Supreme Court of Arizona erred in finding that the petition for review was frivolous *or* taken solely for the purpose of delay.

6. Counsel for Petitioner respectfully allege that the sanctions are being assessed in the absence of due process and the right to confrontation. Counsel for Petitioner should be allowed to present evidence in defense on the issues of "frivolity" and "solely for delay" and to summon witnesses. The Petition for Review was previously considered by the Court of Appeals, state of Arizona, Division One, and although attorneys fees and costs were requested by Respondents, they were denied, even though the Court declined to accept jurisdiction of the special action.

7. The Court of Appeals entertained oral argument on all the issues. Counsel received no warning from the Court of Appeals at that time that indicated any of the issues were frivolous.

8. Counsel for Petitioner made a good faith effort to challenge the constitutionality of the Arizona forcible detainer Statute. Specifically, the statute as applied by the Arizona Superior Court, permits divestiture of an Arizona citizen's right to title as against the lender's claims and foreclosure without due process of law.

9. Specifically, counsel for petitioner argued the following issues:

A. Whether the trial court erred in granting Respondent, Bank One's Motion to Strike of March 19, 1990, and the trial Court did not follow its own Order of March 21, 1990 pursuant to Rule 4(a) of the Arizona Superior Court Uniform Rules of Practice.

B. Whether the trial Court erred in granting the forcible detainer pursuant to ARS Sec. 12-1177 in that the forcible detainer Complaint was deficient in that it did not ask for relief pursuant to any specific forcible detainer statute.

C. Whether the trial Court erred in its decision to grant Summary Judgment on the Lender's Detainer Action.

D. Whether Petitioner was deprived of due process under the law guaranteed by the United States Constitution and the Constitution of the State of Arizona when possession of his property was taken by forcible detainer without adjudication of the underlying fact issues concerning title, i.e. whether the Petitioner was in default; whether there was proper notice before a trustee's sale under ARS Sec. 33-801, et seq.; whether the trustee's sale was valid; whether the Petitioner has a right to raise affirmative defenses; and whether Respondent, Bank One, had the right to possession and the right of possession.

E. Whether or not there is special action jurisdiction because the Petitioner did not have a plain, speedy and adequate remedy by way of direct appeal from the forcible detainer decision. (Petitioner immediately lost possession before he had the right to appeal. The status quo was disturbed prior to determination of Petitioner's appeal.)

10. The issues were based on the following non-frivolous arguments:

1. The trial Court erred in granting Respondent, Bank One's Motion to Strike of March 19, 1990, and the trial Court did not follow its own Order of March 21, 1990, pursuant to Rule 4(a) of the Arizona Superior Court Uniform Rules of Practice. This allegation is based upon the transcript of the record, and the Superior Court Order.

2. The trial Court erred in granting the forcible detainer pursuant to ARS Sec. 12-1177 in that the forcible detainer Complaint was deficient in asking for relief pursuant to any specific forcible detainer statute. This is evident upon its face in that the pleading's prayer for relief was only for writ of restitution pursuant to ARS Sec. 12-1178.

3. The trial Court erred in its decision to grant Summary Judgment through its decision of the defendant being guilty of a forcible detainer pursuant to ARS Sec. 12-1177. In *Heywood v. Ziol,* 372 P.2d 200, the Court states:

> ". . . The issue can only be determined after a presentation of the facts and attending circumstances upon which the right to possession is claimed. However, in the course of such determination it often

> becomes necessary *to resolve both subsidiary issues of fact and law in order to determine who is entitled to possession and these issues are also res judicata.* As so qualified the seemingly broad language in *Cannon v. Arizona Game and Fish Commission,* supra, [85 Ariz. 1, 330 P.2d 501, 503] is a correct statement of law . . ."

a. One of the principal purposes of a motion for summary judgment is to isolate and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett,* 106 S. Ct. 2548, 2552 (1986). See Louis, *Federal Summary Judgment Doctrine: A Critical Analysis,* 83 YALE L.J. 745, 752 (1974); *Currie, thoughts on Directed Verdicts and Summary Judgments,* 45 U.CHI.L.REV. 72, 79 (1977).

b. In *Cf. Bushman v. Halm,* 7698 F.2d 651 (3d Cir. 1986).

> ". . . A summary establishment of fact is an order 'as a matter of law' . . . that a summary establishment of fact is quite different from a finding of fact in that it is subject to appellate review without the constraint of the 'clear error' test prescribed by the finding of fact ARCP Rule 52(a) for judicial findings in non-jury cases. Although pretrial establishment of fact resemble findings of fact in other respects, they are not based on assessments of evidence at trial . . ."

c. Summary judgment requires that the trier of the facts rest upon factual premises that have been summarily established or are establishable. This provision has the effect of requiring the court to "explicate" a summary

judgment in a manner that is analogous to the explication required for a judgment entered after a jury trial.

4. Petitioner was deprived of due process under the law guaranteed by the United States Constitution and the Constitution of the State of Arizona when possession of his propery was taken by forcible detainer without adjudication of the underlying fact issues concerning title, i.e. whether the Petitioner was in default; whether there was proper notice before a trustee's sale under ARS Sec. 33-801, et seq.; whether the trustee's sale was valid; whether the Petitioner has a right to raise affirmative defenses; and whether Respondent, Bank One, had the right to possession and the right of possession.

a. A review of the Superior Court's forcible entry and detainer decision, on summary judgment, leaves no doubt that the trial Court refused to entertain any evidence from Petitioner regarding defects in Bank One's "asserted title"—even on the limited basis of such evidence's bearing on the "superior" right to possession between the parties.

b. To the extent that the Superior Court is held to have correctly interpreted the meaning and intent of the statute by this reviewing Court, such statute is clearly unconstitutional. The Superior Court deprived Schoeffler of equal protection of the laws, due process and, more specifically, his "right to confrontation" under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and the due process and equal protection clauses of the Constitution of the State of Arizona. Simply put, a "privileged class" of creditors cannot be set up by the Arizona Legislature or the Arizona Courts in such a way as to allow such "privileged class" to admit

evidence bearing on its own right to possession of disputed real estate while denying the right to controvert such evidence to the "underprivileged debtors".

5. There is special action jurisdiction because the Petitioner did not have a plain, speedy and adequate remedy by way of direct appeal from the forcible detainer decision. Petitioner immediately lost possession and the status quo was disturbed. The appeal rights from a adverse detainer judgment under Arizona law, as interpreted by the lower courts, are inadequate because they provide no means to litigate and decide defensive issues prior to loss of possession.

11. Counsel for Petitioner respectfully argue that the Petition for Review was not "taken solely for the purpose of delay". By the time this Petition for Review was argued before the Arizona Court of Appeals, Petitioner had already been evicted from his homestead.

12. Thus no *delay* to the creditor resulted from this Petition. Any delay from the Creditor filing for a Writ of Possession after denial of Petitioner's stay application. The issue of whether the Arizona forcible detainer statutes, which allow a foreclosure sale without proper notice, and a forcible detainer proceeding foreclosing the ability of Respondent to argue superior rights to title and possession, thereby allowing a mortgage company to write their own trustee deed and then evict a homeowner, without any possibility for the homeowner to defend his title in the proceeding and controvert such evidence, is a "taking of property without due process of law" according to the U.S. Constitution and is blatantly unconstitutional. This issue is "ripe" for review by the Arizona Supreme Court.

13. It is probable that this Honorable Court has mis-

construed the purpose of the filing of this Petition for Review. Counsel for Petitioner would greatly appreciate a reconsideration of the basis for its order for sanctions and a withdrawal of its order dated October 9, 1990.

Wherefore, in consideration of the above argument, Counsel for Petitioner, respectfully pray that this Honorable Court reconsider its Order of October 9, 1990, and withdraw the Order for Sanctions.

RESPECTFULLY SUBMITTED, this 18th day of October, 1990.

/s/ AFTON JANE IZEN
Afton Jane Izen
TX Bar #10443400
Joe Alfred Izen Jr.
TX Bar #10443500
IZEN AND ASSOCIATES, P.C.
5222 Spruce Street
Bellaire, TX 77401
713-668-8815
Attorneys for Petitioner

/s/ FLOYD W. BYBEE
Floyd W. Bybee
AZ Bar #012651
9201 N. 25th Ave Suite #110
Phoenix, AZ 85021
602-870-9700
Local Counsel for Petitioner

CERTIFICATE OF SERVICE

This 18th day of October, 1990, I certify that the original and true and correct copies of the foregoing were sent by U.S. mail, postage-paid and/or messenger to the following:

Clerk of Court of Appeals
1700 W. Washington St.
Phoenix, AZ 85007

Hon. Robert D. Myers
Superior Court Judge
201 W. Jefferson St.
Phoenix, AZ 85003
Respondent

Deborah M. Fine
LEWIS AND ROCA
40 No. Central Ave.
Phoenix, AZ 85004
Attorneys for Respondent
Bank One, Milwaukee, N.A.

By: /s/ Signature Illegible
Signature

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LAWRENCE E. SCHOEFFLER, an unmarried man,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, THE HONORABLE ROBERT D. MYERS, a judge thereof,
Respondent Judge,

BANK ONE, MILWAUKEE, N.A.,
a Wisconsin corporation,
Real Party in Interest.

1 CA-SA 90-068

DEPARTMENT D

MARICOPA County
Superior Court No. CV 90-01627

ORDER

This special action was considered at conference on April 24, 1990, Presiding Judge J. Thomas Brooks and Judges Noel Fidel and John F. Taylor participating.

IT IS ORDERED that the Court of Appeals, in the exercise of its discretion, declines to accept jurisdiction in this special action.

IT IS FURTHER ORDERED denying respondents' request for attorney's fees.

DATED this 25th day of April, 1990.

/s/ J. THOMAS BROOKS
J. Thomas Brooks, Presiding

EXHIBIT A

SUPREME COURT
STATE OF ARIZONA

Noel K. Dessaint
Clerk of Court

Kathleen E. Kempley
Chief Deputy Clerk

201 West Wing State Capitol
1700 West Washington
Phoenix Arizona 85007-3846
Telephone: (602) 542-4536

September 24, 1990

RE: LAWRENCE E. SCHOEFFLER vs. SUP CT MARICOPA CO-HON. ROBERT D. MYERS/ BANK ONE, MILWAUKEE
Supreme Court No. CV-90-0219-PR
Court of Appeals No. 1 CA-SA 90-068
Maricopa County No. CV 90-01627

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 18, 1990, in regard to the above-referenced cause:

ORDERED: Petition for Review — DENIED. Order concerning fees and sanctions will follow.

Record returned to the Court of Appeals, Division One, Phoenix, this 24th day of September, 1990.

NOEL K. DESSAINT, Clerk

TO:

Floyd W. Bybee, Esq., P.O. Box 83312, Phoenix, AZ 85071

Joe Alfred Izen, Esq. and Afton Jane Izen, Esq., Izen and Associates, P.C., 5222 Spruce Street, Bellaire, TX 77401

Deborah M. Fine, Esq., Lewis and Roca, 40 N. Central Ave., Suite 2, Phoenix, AZ 85004

Glen D. Clark, Clerk. Court of Appeals, Division One, West Wing, State Capitol, 1700 W. Washington, Phoenix, AZ 85007

Mead Data Central, Inc., P.O. Box 8809, Dayton, OH 45401

EXHIBIT B

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

LAWRENCE E. SCHOEFFLER, an unmarried man,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa; HON. ROBERT D. MYERS, a Judge thereof; BANK ONE, MILWAUKEE, N.A., a Wisconsin corporation, real party in interest; and COURT OF APPEALS FOR THE STATE OF ARIZONA, Division One,
Respondents.

Supreme Court
No. CV-90-0219-PR

Court of Appeals
No. 1 CA-SA 90-068

Maricopa County
No. CV 90-01627

ORDER

The Court has previously denied the petition for review filed by petitioner. In addition, the Court further finds that the petition for review was frivolous or taken solely for the purpose of delay. Therefore, under Rule 25, Ariz. R. Civ. App. P., 17B A.R.S., sanctions are imposed as follows:

IT IS ORDERED that each attorney for petitioner is to pay the Clerk of the Supreme Court the sum of $500 within twenty days of the date of this order. Each at-

torney shall certify that the funds he paid have not and will not be recouped from petitioner.

Dated this 9th day of October, 1990

/s/ FRANK X. GORDON, JR.
Frank X. Gordon, Jr.
Chief Justice

TO:

Floyd W. Bybee, Esq., P.O. Box 83312, Phoenix, AZ 85071

Joe Alfred Izen, Esq. and Afton Jane Izen, Esq., Izen and Associates, P.C., 5222 Spruce Street, Bellaire, TX 77401

Deborah Fine, Esq., Lewis and Roca, 40 N. Central Ave., Suite 2, Phoenix, AZ 85004

Glen D. Clark, Court of Appeals, Division One, West Wing, State Capitol, 1700 W. Washington, Phoenix, AZ 85007

EXHIBIT C

APPENDIX G

SUPREME COURT
STATE OF ARIZONA

Noel K. Dessaint
Clerk of Court

Kathleen E. Kempley
Chief Deputy Clerk

801 West Wing State Capitol
1700 West Washington
Phoenix, Arizona 85007-2566
Telephone: (602) 542-4536

November 15, 1990

RE: LAWRENCE E. SCHOEFFLER vs. SUP. CT. MARICOPA CO-HON. ROBERT D. MYERS/ BANK ONE, MILWAUKEE
Supreme Court No. CV-90-0219-PR
Court of Appeals No. 1 CA-SA 90-068
Maricopa County No. CV 90-01627

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 14, 1990, in regard to the above-referenced cause:

ORDERED: Motion for Reconsideration of Order for Sanctions—DENIED.

Each attorney for petitioner is to pay the Clerk of the Supreme Court the sum of $500 within twenty days of the date of this order (11/14/90). Each attorney shall certify that the funds he paid have not and will not be recouped from petitioner.

NOEL K. DESSAINT, Clerk

TO:

Floyd W. Bybee, Esq., P.O. Box 83312, Phoenix, AZ 85071

Joe Alfred Izen. Esq and Afton Jane Izen, Esq., Izen and Associates, P.C., 5222 Spruce Street, Bellaire, TX 77401

Deborah M. Fine, Esq., Lewis and Roca, 40 N. Central Ave., Suite 2. Phoenix, AZ 85004

90-1447

Supreme Court, U.S.
FILED
APR 15 1991
OFFICE OF THE CLERK

No. 91-A-601

In The
Supreme Court of the United States

October Term, 1990

FLOYD W. BYBEE, AFTON JANE IZEN,
JOE ALFRED IZEN, JR., AND
LAWRENCE E. SCHOEFFLER,
Petitioners,

v.

BANK ONE, MILWAUKEE, N.A.,
Respondent.

On Writ of Certiorari to the Arizona Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

LEWIS AND ROCA
John P. Frank
Counsel of Record

Deborah Fine
40 N. Central Ave., 19th Floor
Phoenix, Arizona 85004
(602) 262-5311
Attorneys for Respondent

No. 91-A-601

In The
Supreme Court of the United States

October Term, 1990

FLOYD W. BYBEE, AFTON JANE IZEN,
JOE ALFRED IZEN, JR., AND
LAWRENCE E. SCHOEFFLER,
Petitioners,

v.

BANK ONE, MILWAUKEE, N.A.,
Respondent.

On Writ of Certiorari
to the Arizona Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

This Court has no jurisdiction over this petition for certiorari; in any case, it is without merit.

1. This was an eviction (forcible detainer) action filed against petitioner Schoeffler in the Superior Court of Maricopa County, Arizona. The federal question regarding the forcible detainer statute sought to be presented here was not mentioned at the trial court. (The Arizona Forcible Entry and Detainer statute is found at Arizona Revised Statutes (hereafter A.R.S.) §§ 12-1171 *et seq.*; *see* Appendix A.) In view of the fact that petitioner Schoeffler does not comply at

all with this Court's Rule 14.1(h), Rules of the Supreme Court of the United States, requiring specific reference to the exact portions of the record showing the raising and ruling on the federal question, we do not burden the Court with an appendix to prove the negative. [1] The superior court ordered the eviction. The superior court is the last, as well as the only, court in Arizona which ever passed on the merits of petitioner Schoeffler's defenses, which, as noted, did not include the asserted federal question. This Court, therefore, has no jurisdiction under 28 U.S.C. § 1257.

2. Petitioner Schoeffler, losing in the state trial court, filed a petition for special action in the Arizona Court of Appeals. Under the Arizona practice, this amounts to a petition for either mandamus or prohibition. Rule 1, Arizona Rules of Procedure for Special Actions, 17B A.R.S., p. 190. Acceptance of jurisdiction is, like a petition for writ of certiorari to this Court, discretionary. *See* Rule 3, *id.*, State Bar Committee Note ("highly discretionary"), p. 200. As the petition appendix shows, p. 5a, the Arizona Court of Appeals "decline[d] to accept the jurisdiction in this special action," and the Arizona Supreme Court denied the petition for review, *id.*, p. 7a. As well as not raising the federal constitutional question at the state trial court level, petitioner Schoeffler did not raise the issue at the state court of appeals level. Again, petitioner Schoeffler has not complied with Rule 14.1(h) regarding the proceedings at the Arizona Court of Appeals. Although the same rule was further ignored by petitioner Schoeffler regarding the Arizona Supreme Court proceedings, we concede that the federal question was raised

---

[1] Petitioner Lawrence Schoeffler was the sole defendant in the forcible detainer action. The other petitioners here, Floyd Bybee, Afton Izen, and Joe Izen, Jr., were his legal counsel. When "petitioner Schoeffler" is used herein, it refers to actions or arguments raised by him or made on his behalf by the other petitioners.

Contrary to petitioners' list of parties below, petition, p. ii, Deborah Fine was not a party to the proceedings at any stage; she was counsel for Bank One, Milwaukee, N.A.

in the petition for review to the Arizona Supreme Court. Nevertheless, it was never passed on. The Arizona Supreme Court may have declined review for any number of reasons, one of which may perfectly well have been that the question had not been timely raised. *See Schoenfelder v. Arizona Bank*, 165 Ariz. 79, 88, 796 P.2d 881, 890 (1990).

3. Petitioner Schoeffler's complaint is frivolous. The trial court gave summary judgment against him. Petitioner Schoeffler contends here that there were disputed questions of fact. The sole argument of petitioner Schoeffler is that he was entitled to a "hearing" before eviction, relying entirely on *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), which invalidated prejudgment replevins without hearing. Petitioner Schoeffler does not comprehend that a summary judgment proceeding *is* a hearing and that *Fuentes* has no relevance at all. It is too late in the day to argue about the constitutionality of summary judgment and Rule 56 of the Rules of Civil Procedure. *See Fidelity & Deposit Co. v. United States to Use of Smoot*, 187 U.S. 315, 320, 23 S. Ct. 120, 47 L. Ed. 194 (1902); 10 Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2714 (1983). No federal question peculiar to this case is raised on the papers.

4. The Arizona Supreme Court denied the petition for review on September 24, 1990 (the only stage at which petitioner Schoeffler raised the constitutionality of the summary judgment). The order assessing a charge against petitioners Bybee, A. Izen and J. Izen, Jr., for a frivolous appeal was entered on October 9, 1990. Rehearing was sought solely on the latter order. Petition appendix, p. 12a. The 90-day period for the petition for certiorari from the September 24, 1990 order, as prescribed in 28 U.S.C. § 2101(c), expired on December 22, 1990. On February 11, 1991, petitioners applied for an extension for filing their petition for certiorari. On February 13, 1991, this Court *ex parte* granted an extension of time to file a petition for a writ of certiorari, the petitioners' application claiming that the proper due

date for the petition of certiorari was February 12, 1991. This was far past the 90 days after the decision of the Arizona Supreme Court denying the petition for review, as to which there was no petition for rehearing (indeed such a motion would not have been permitted in the Arizona practice absent specific permission, Rule 22(d), Arizona Rules of Civil Appellate Procedure, 17 A.R.S., p. 61). Under Rule 30.2 of this Court, the extension of time "must be presented to the Clerk within the period sought to be extended," and so far as the denial of the petition for review is concerned, the application was too late. Moreover, under the same rule of this Court, the application for certiorari on the sanctions issue was filed one day before the filing date and there were no "extraordinary circumstances" presented for waiving the normal 10-day requirement.

5. On the sanctions question, the issue raised by petitioners is that Appellate Rule 25, Ariz. Rules of Court, p. 276, [2] permitting sanctions for frivolous appeals, is invalid for want of hearing. The rule is, in this respect, parallel to F.R.A.P. 38. With a frivolous appeal (as distinguished from bad faith or want of sufficient inquiry), all matters are before the Court on the face of the documents and some penalty, without proliferating the litigation into further stages, has been the practice throughout this century. *See* 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction* § 3984 (1977); *Hill v. Norfolk & Western Railway Co.*, 814 F.2d 1192, 1200 (7th Cir. 1987); *Toepfer v. Dept. of Transportation*, 792 F.2d 1102 (Fed. Cir. 1986).

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[2] Appellate Rule 25, Arizona Rules of Court, states:

> Where the appeal is frivolous or taken solely for the purpose of delay, or where a motion is frivolous or filed solely for the purpose of delay, or where any party has been guilty of an unreasonable infraction of these rules, the appellate court may impose upon the offending attorneys or parties such reasonable penalties or damages (including contempt, withholding or imposing of costs, or imposing of attorneys' fees) as the circumstances of the case and the discouragement of like conduct in the future may require.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

RESPECTFULLY SUBMITTED.

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April, 1991. By _____

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APPENDIX A

§ 12-1171. Acts which constitute forcible entry or detainer

A person is guilty of forcible entry and detainer, or of forcible detainer, as the case may be, if he:

1. Makes an entry into any lands, tenements or other real property, except in cases where entry is given by law.

2. Makes such an entry by force.

3. Wilfully and without force holds over any lands, tenements or other real property after termination of the time for which such lands, tenements or other real property were let to him or to the person under whom he claims, after demand made in writing for the possession thereof by the person entitled to such possession.

§ 12-1172. Definition of forcible entry

A "forcible entry," or an entry where entry is not given by law within the meaning of this article, is:

1. An entry without the consent of the person having the actual possession.

2. As to a landlord, an entry upon the possession of his tenant at will or by sufferance, whether with or without the tenant's consent.

§ 12-1173. Definition of forcible detainer; substitution of parties

There is a forcible detainer if:

1. A tenant at will or by sufferance or a tenant from month to month or a lesser period whose tenancy has been terminated retains possession after his tenancy has been terminated or after he receives written demand of possession by the landlord.

2. The tenant of a person who has made a forcible entry refuses for five days after written demand to give possession to the person upon whose possession the forcible entry was made.

3. A person who has made a forcible entry upon the possession of one who acquired such possession by forcible entry refuses for five days after written demand to give possession to the person upon whose possession the first forcible entry was made.

4. A person who has made a forcible entry upon the possession of a tenant for a term refuses to deliver possession to the landlord for five days after written demand, after the term expires. If the term expires while a writ of forcible entry applied for by the tenant is pending, the landlord may, at his own cost and for his own benefit, prosecute it in the name of the tenant.

§ 12-1173.01. Additional definition of forcible detainer

A. In addition to other persons enumerated in this article, a person in any of the following cases who retains possession of any land, tenements or other real property after he received written demand of possession may be removed through an action for forcible detainer filed with the clerk of the superior court in accordance with this article:

1. If the property has been sold through the foreclosure of a mortgage, deed of trust or contract for conveyance of real property pursuant to title 33, chapter 6, article 2.[1]

2. If the property has been sold through a trustee's sale under a deed of trust pursuant to title 33, chapter 6.1.[2]

3. If the property has been forfeited through a contract for conveyance of real property pursuant to title 33, chapter 6, article 3.[3]

4. If the property has been sold by virtue of an execution and the title has been duly transferred.

5. If the property has been sold by the owner and the title has been duly transferred.

B. The remedies provided by this section do not affect the rights of persons in possession under a lease or other

possessory right which is superior to the interest sold, forfeited or executed upon.

C. The remedies provided by this section are in addition to and do not preclude any other remedy granted by law.

[1]Section 33-721 et seq.

[2]Section 33-801 et seq.

[3]Section 33-741 et seq.

§ 12-1174. Immateriality of time possession obtained by tenant

It is not material whether a tenant received possession from his landlord or became his tenant after obtaining possession.

§ 12-1175. Complaint and answer; service and return

A. When a party aggrieved files a complaint of forcible entry or forcible detainer, in writing and under oath, with the clerk of the superior court or a justice of the peace, summons shall issue no later than the next judicial day.

B. The complaint shall contain a description of the premises of which possession is claimed in sufficient detail to identify them and shall also state the facts which entitle the plaintiff to possession and authorize the action.

C. The summons shall be served at least two days before the return day, and return made thereof on the day assigned for trial.

§ 12-1176. Demand for jury; trial procedure

A. The clerk or justice of the peace shall at the time of issuing the summons, if requested by the plaintiff, issue a venire to the sheriff or constable of the county commanding him to summon a jury of eight persons, if the proceeding is in the superior court, and six persons, if in the justice court, qualified jurors of the county, to appear on the day set for trial to serve as jurors in the action. The venire shall be served and returned on the day assigned for trial. The trial

date shall be no more than five judicial days after the aggrieved party files the complaint.

B. If the plaintiff does not request a jury, the defendant may do so when he appears, and the jury shall be summoned in the manner set forth in subsection A.

C. If any jurors fail to attend, or are excused after being challenged, the jury shall be completed by causing other qualified jurors to be summoned immediately.

D. The action shall be docketed and tried as other civil actions.

§ 12-1177. Trial and issue; postponement of trial

A. On the trial of an action of forcible entry or forcible detainer, the only issue shall be the right of actual possession and the merits of title shall not be inquired into.

B. If a jury is demanded, it shall return a verdict of guilty or not guilty of the charge as stated in the complaint. If a jury is not demanded the action shall be tried by the court.

C. For good cause shown, supported by affidavit, the trial may be postponed for a time not to exceed three days in a justice court or ten days in a superior court.

§ 12-1178. Judgment; writ of restitution; limitation on issuance

A. If the defendant is found guilty, the court shall give judgment for the plaintiff for restitution of the premises, for late charges stated in the rental agreement and for costs and, at the plaintiff's option, for all rent found to be due and unpaid at the date of the judgment, and shall grant a writ of restitution.

B. If the defendant is found not guilty, judgment shall be given for the defendant against the plaintiff for costs, and if it appears that the plaintiff has acquired possession of the premises since commencement of the action, a writ of restitution shall issue in favor of the defendant.

C. No writ of restitution shall issue until the expiration of five days after the rendition of judgment. The writ of restitution shall be enforced as promptly and expeditiously as possible.

§ 12-1179. Appeal to superior court; notice; bond

Either party may appeal from a justice court to the superior court of the county in which the judgment is given by giving notice as in other civil actions and filing with the justice of the peace within five days after rendition of the judgment a bond in an amount fixed and approved by the court, with sureties to be approved by the justice of the peace, payable to the clerk of the superior court and conditioned that he will prosecute the appeal to effect and will pay the rental value of the premises pending the appeal and all costs, damages and rent which may be adjudged against him.

§ 12-1180. Stay of proceedings on judgment; record on appeal

When the appeal bond is filed and approved, the justice of the peace shall stay further proceedings on the judgment and immediately prepare a transcript of all entries on his docket in the action and transmit it, together with all the original papers, to the clerk of the superior court of the county in which the trial was had.

§ 12-1181. Trial and judgment on appeal; writ of restitution

A. On trial of the action in the superior court, appellee, if out of possession and the right of possession is adjudged to him, shall be entitled to damages for withholding possession of the premises during pendency of the appeal and the court shall also render judgment in favor of appellee and against appellant and the sureties on his bond for damages proved and costs.

B. The writ of restitution or execution shall be issued by the clerk of the superior court and shall be executed by the sheriff or constable as in other actions.

§ 12-1182. Appeal to supreme court; stay and bond

A. In a forcible entry or forcible detainer action originally commenced in the superor court, an appeal may be taken to the supreme court as in other civil actions.

B. The appeal, if taken by the party in possession of the premises, shall not stay execution of the judgment unless the superior court so orders, and appellant shall file a bond in an amount fixed and approved by the court, conditioned that appellant will prosecute the appeal to effect and will pay the rental value of the premises pending the appeal and all damages, costs, and rent adjudged against him by the superior court or the supreme court.